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No. 81-136

IN THE SUPREME COURT
OF THE UNITED STATES

October 1980 Term

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LEONEL A. MORALES,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

---

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

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# PETITION FOR CERTIORARI

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LEONEL A. MORALES
Petitioner
110 N. 5th St.
Pasco, WA 99301
(509) 547-0184

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## I. QUESTIONS PRESENTED FOR REVIEW

1. Did the Washington courts use the proper constitutional test for deciding whether the petitioner had effective assistance of counsel under the 6th and 14th Amendments?

2. Was petitioner's right to the effective assistance of counsel under the 6th and 14th Amendments violated in his criminal trial?

3. Did the state court's denial of public funds to pay for a psychiatric examination of the alleged victim violate the petitioner's right to confront witnesses, to have his own witnesses, to due process and equal protection under the 6th and 14th Amendments?

4. Did the petitioner knowingly and voluntarily waive his right to testify at his criminal trial?

5. Did the court's instruction to the jury regarding the petitioner's not

testifying at his trial violate the petitioner's rights under due process and the 5th and 14th Amendments?

## II. LIST OF PARTIES

1. Leonel A. Morales, petitioner.
2. State of Washington, respondent.

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## V. DECISIONS OF LOWER COURTS

The petitioner's conviction was affirmed by an unpublished opinion of the Washington Court of Appeals, 28 Wash. App. 1001, on December 18, 1980. A Petition for Review was denied by the Washington Supreme Court on April 17, 1981. 95 Wash. 2d 1016.

## VI. GROUNDS FOR JURISDICTION

1. Dates of judgments to be reviewed:

December 18, 1980 (Court of Appeals)

April 17, 1981 (Washington Supreme Court).

2. This Court has jurisdiction to hear this case under 28 U.S.C. §1257(3).

## VII. CONSTITUTIONAL SECTIONS INVOLVED

1. Amendment 5: ...nor shall be compelled in any criminal case to be a witness against himself...

2. Amendment 6: In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. Amendment 14: ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## VIII. STATEMENT OF THE CASE

On November 20, 1978, an Information was filed in the Superior Court of Spokane County, charging the defendant with Indecent Liberties in violation of Revised Code of Washington (RCW) 9A.88.100. The Information alleged that the crime was committed on or about bet-

ween July 31, 1977, and August 30, 1977.

In December of 1978, the defendant moved, through his attorney, for a continuance until such time as a trial date could be set. Trial was continued to and set for February of 1979. On February 28, 1979, the State and the defense attorney moved again to re-set the trial date, and said motion was granted, re-setting the trial for March 27, 1979. The defendant himself did not sign that order of continuance nor did he sign or attach any waivers of CrR 3.3.

Before trial, on February 23, 1979, the defense moved to have the alleged victims examined by a psychiatrist. This motion was granted on the condition that the defendant bear the expense of said examination. On the day of trial, the defense moved for such an examination at state's expense rather than at

the defendant's expense, which motion was denied. (Report of Proceedings 4-7).

At trial, the defendant did not testify. (RP 249). The jury returned a verdict of guilty on March 30, 1979. No post trial motions were filed or argued by the defense trial counsel. (RP 281).

The defendant was sentenced to probation on May 10, 1979, conditioned on a county jail sentence. (CP 29-30). The trail counsel then withdrew from the case. (CP 32). Notice of appeal was filed on May 17, 1979. The petitioner had a new attorney on his appeal in the Washington Courts.

The transcript of the trial show the following facts concerning the issues in this petition:

A hearing was held before selecting the jury. (RP 7-56). The trial counsel did not ask to see the constitutional

rights card allegedly read to the defendant by Detective Campbell. (RP 13-20).

During voir dire of the prospective panel, the trial judge excused two jurors sua sponte. (RP 62, 65).

The trial counsel asked very few questions during their portion of voir dire. (RP 67-95).

In opening statement for the defense, trial counsel for defendant attempted to read from the police reports to the jury (RP 101) and told the jury the defendant would testify, although ultimately he did not. (RP 202, 249).

During the state's case-in-chief, trial counsel for the defendant failed to object to a single question asked by the prosecution. (RP 104-195). Three children, all under the age of ten, were permitted to testify without objection as to their competency by defense counsel. (RP 104, 121, 128).

During the last part of the trial, the defendant's release on his own recognizance was revoked at a hearing out of the presence of the jury without any of the witnesses cross-examined by trial defense counsel. (RP 242-248).

The trial counsel for defendant attempted to withdraw while the case was still in progress, stating his dislike for the defendant. (RP 247).

The defendant told the court at the time of sentencing that his attorneys were the ones who told him not to testify. (RP 285-286).

## IX. ARGUMENT IN SUPPORT OF WRIT

### A. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BEFORE, DURING AND FOLLOWING HIS TRIAL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS.

The petitioner has a right under the 6th and 14th Amendments to the effective assistance of counsel. Cuyler v.

Sullivan, ____ U.S. ____, 100 S.Ct. 1708 (1980). The petitioner's trial counsel repeatedly showed that he did not adequately represent the petitioner in this case. He showed obvious lack of knowledge of how to represent a defendant in a criminal case.

Nothing done by the petitioner's trial lawyer can be considered as trial strategy of tactics. Below are several specific examples of incompetence and following each, the petitioner has set forth what would have been adequate or effective representation in a case of this nature.

1. Failure to conduct adequate cross-examination at the CrR 3.5 ( re-trial) hearing.

Before trial, a hearing was held to determine the voluntary nature of certain statements allegedly made by the defendant to Detective Campbell. (RP

7-56). Detective Campbell admitted during part of his testimony that he wasn't sure if the defendant understood his rights. (RP 9-10). Detective Campbell further admitted that without checking his notes, he would be hard pressed to remember exactly the discussion he had with the defendant. (RP 12).

On cross-examination, defense counsel asked the detective open-ended, non-leading questions. (RP 13-20). He asked the detective to tell the court how he advises anyone of their rights, but not to produce the rights card, if any, which he used to advise Mr. Morales on this particular occasion. (RP 14).

Proper cross-examination in a setting such as this would consist of at least the following relevant questions.

> Q: Detective, you didn't advise Mr. Morales of his rights by reading from a rights card, did you?

Q: Detective, you didn't ask Mr. Morales to sign a standard rights card, and indicate on the card whether he understood his rights and wished to waive them, did you?

Q: Detective, in the normal course of events, as a standard practice, you ask most, if not all, suspects to sign and date a rights card before questioning, don't you?

Q: And we have no such card here in court today, do we?

Q: Detective, before your interview, you didn't know how long Mr. Morales had been in America, did you?

Q: You don't know whether Mr. Morales has had classes in English, do you?

Q: You're not claiming to be expert enough to measure how well Mr. Morales knows the English language, are you?

Q: To your personal knowledge, you do not know whether Mr. Morales had ever heard the following words or understood their meaning: "Oral," "sodomy," "vagina," "counsel," "funds," "appoint," do you, Detective, before your interview?

Q: No Spanish interpreter was used during your interview with Mr. Morales, was there, Detective?

Q: You didn't use any of the Spanish words for "oral," "sodomy," "vagina," "counsel," "funds," or "appoint," did you, Detective?

Failure to ask the questions outlined above and other questions which could have changed the judge s view of the voluntariness of the statements resulted in the judge ruling in favor of the state at the hearing. (RP 51-56). Those statements were obviously prejudicial to the defendant during the trial and competent counsel would have made a more serious and more precise effort to suppress them.

2. Failure to have the alleged victim examined by psychiatrist.

Before trial, the defense had moved to have the alleged victim examined by a psychiatrist. That motion was granted on February 23, 1979, on condition that the defense pay for it. This was over a full month before the trial date, but

the motion was renewed again on trial day by trial defense counsel, this time asking the court for public funds to pay for such examination. The motion was denied and the trial proceeded. (RP 4-7).

The right way to handle this, if money wasn't available in the beginning, would have been a motion early in the discovery section of trial preparation, under a state court rule which reads:

> Counsel for a defendant who is financially unable to obtain ...expert, or other services may request them by motion. Upon finding that the services are necessary and the defendant is unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. CrR 3.1(f).

Trial counsel did not submit affidavit or other proof of the petitioner's indigency so a court could rule on his ability to pay for the psychiatric services. The motion judge did allow for

the psychiatric examination at defendant's expense, so it can be assumed the propriety of the services was not an issue.

3. Ineffective and incomplete voir dire by trial defense counsel.

During voir dire, twenty-three prospective jurors were questioned by trial counsel for both sides. The defense trial counsel asked only ten basic questions to the prospective jurors during voir dire.

The question most frequently asked was whether the jurors had heard the previous jurors' answers and whether the present juror's answers would be any different. (RP 69, 71, 72, 74, 76, 77, 79, 80, 81, 83, 84, 85, 88, 89, 92, 93, 94). Experienced and competent counsel know that most jurors on any prospective panel will give the expected answer to a question of that nature.

Several dozen questions should have been asked that were not. Many modern treatises on criminal law contain suggested areas to cover and the manner in which to address the area. See Bailey, Successful Techniques For Criminal Trials, § 95-96 (1971).

Without setting out the individual questions which should have been asked, the general areas which should have been touched on with the jurors are as follows:

(a) Speculation and guesswork has no place in a criminal trial?

(b) Independent person who would make up own mind?

(c) Keep an open mind until all the evidence is in?

(d) Put more or less credibility on testimony by the defendant just because he is the defendant?

(e) Any fear of future criticism?

(f) Presumption of innocence is with the defendant during the whole trial?

(g) Could you vote not guilty if the prosecutor failed to prove on single element beyond a reasonable doubt?

(h) In judging the credibility of a child witness or any witness, will you consider the witness's capacity for memory and observation, and any bias or prejudice he or she may have?

As a result of the inadequate questioning done by trial counsel to probe for biases and prejudices, the intelligent use of preemptory challenges by the defense was impossible and some of the panel actually struck may have been better jurors than those left on the panel.

4. The ineffective and inadequate opening statement by trial defense counsel.

Experienced and competent trial counsel know that an opening statement is the first opportunity to make a good impression as to the facts and the defendant. Bailey, supra, § 112 through

129. At a bare minimum, defense counsel should give an opening statement which proceeds smoothly from point to point, describing the client's favorable background, emphasizing what issues will have to be decided and what issues will be agreed upon, disclosing the weak points of the defense, highlighting the strong points of the defense, reminding the jury who has the burden of proof, asking for an open mind until all the evidence is in for both sides, and naming the major witnesses for the defense together with what the substance of their testimony will be. Bailey, supra, § 112-129.

Instead, what occurred in the present case was a weak presentation by counsel who confessed openly to the jury it was his first criminal jury case. (RP 101-104, 201-202). To make matters worse, the trial defense counsel pro-

mised the jury that the defendant himself would testify (RP 202), although ultimately he didn't testify at all to the jury. (RP 249).

When the prosecutor continuously objected throughout the opening argument, and the trial defense counsel improperly tried to read from police reports to the jury, and the defense trial counsel embarrassingly acknowledged it was his first such case, the jury could not help but be unfavorably impressed as to the validity of any genuine issues raised by the defense.

5. Failure by trial defense counsel to object to the competency of the child witnesses.

Three girls, all under the age of ten, testified for the state. (RP 104, 120, 128). Trial defense counsel failed to raise the well known statutory objec-

tion to their competency to testify found in RCW 5.60.050(2) which reads in part:

> Who are incompetent. The following persons shall not be competent to testify: ....(2) children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them.

The rules governing the competence of children under ten to testify are set out in State v. Sims, 4 Wash. App. 188, 189, 480 P.2d 228 (1971):

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words her memory of the occurrence; and (5) the capacity to understand simple questions about it.

The proper procedure to be followed in any case where children under ten may be witnesses is to conduct a preliminary examination out of the presence of the jury to determine their competency. The judge would then have an opportunity to exercise his discretion and allow or disallow the minor child to testify. Such a preliminary examination is recognized in the cases State v. Sims, supra, at 189, 190; and State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

In this case there was no request for such a preliminary examination and there was no objection to the competency of the minor witnesses' testimony. (RP 104, 120, 128). The trial court was therefore never given an opportunity to exercise its discretion by making a ruling on their competence. If the children were found incompetent during a preliminary examination for whatever

reason, the state's entire case would have had to have been dismissed.

6. Failure to adequately cross-examine any of the state's witnesses.

Defense trial counsel, on cross-examination of the three minor children, essentially asked them to repeat their entire direct testimony. (RP 110-119, 125, 127, 133-142). This could only serve to emphasize damaging testimony more permanently in the minds of the jurors.

The first rule of good cross-examination is never to let a witness repeat his direct testimony. Other important principles are to ask only leading questions, save the ultimate point for your summation, don't argue with the witnesses, be brief, don't ask questions you don't know the answer to, and bring out all bias or prejudice the witness has toward your client. At one

point or another during the cross-examination of the several witnesses for the state, trial counsel for the defendant violated nearly every one of these principles that competent counsel would have followed. (RP 13-20, 24-28, 30-33, 39-45, 110-119, 125-127, 133-142, 150-164, 170-179, 183-188).

7. Failure to make a single objection to the state's testimony.

This is an area which is often influenced by tactical considerations. There are many situations where trial lawyers feel that repeated objections may irritate the judge or the jury to the detriment of the client. But not to make one single objection during a 2½-day trial indicates lack of knowledge rather than an exercise of discretion.

Although the transcript indicates the lack of a single objection, testimony of one witness for the state was

particularly objectionable. Beverly Butler, the mother of one of the young children who testified, was allowed to testify as to a conversation she had with her daughter about the defendant's alleged criminal activities. (RP 145-146). She admitted that her conversation took place approximately a year after the alleged crime. (RP 146). Therefore, her conversation with her daughter was clearly hearsay and did not fit within the excited utterance exception to the hearsay rule.

Trial counsel never objected to this testimony and the jury was thus allowed to hear improper evidence on a crucial issue at the trial.

8. Failure of trial counsel to make motions to dismiss or to file post-trial motions.

Trial counsel failed to move for a dismissal at the close of the state's

case-in-chief or after all the evidence was in (RP 200, 249). Trial counsel also failed to move for a new trial or a judgment notwithstanding the verdict before the sentencing. (RP 281). Both such motions are authorized by applicable court rules.

Thus, the court was never asked to exercise its discretion after viewing the witnesses and the evidence to determine the sufficiency of the state's case.

9. Failure to object to the giving of court's instruction number 7.

After the defendant did not testify, the prosecutor added an additional instruction to those he had already proposed. (RP 250). That instruction read as follows:

> Instruction No. 7
>
> You are instructed that under the laws of this state, a defendant is a competent witness in his own behalf, but

> he may or may not take the witness stand as a witness at his option. No inference of guilt or innocence is to be drawn by you from the fact that the defendant fails or refused to take the witness stand as a witness in this case.

This instruction was given to the jury without objection to any part of it by trial defense counsel. Counsel should have objected to its use because of a better instruction now in use, which reads as follows:

> The fact that the defendant has not testified must not be considered by you in arriving at your verdict.

If any instruction was to be given on this subject, the newer, better statement of the law would have been the choice of competent counsel.

The validity of Instruction No. 7 as given is very dubious in light of Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), and

Carter v. Kentucky, ____ U.S. ____, 101 S.Ct. 1112 (1981).

The instruction is particularly offensive in this case because defense trial counsel had promised the jury in their opening remarks that defendant would testify (202), and then he never did testify. (RP 249).

The language of the instruction itself is offensive to basic constitutional concepts. To say "no inference of guilt or innocence is to be drawn" contradicts other instructions where the jury is told the defendant is presumed innocent. (CP 19). In particular, the phrase "the fact that the defendant fails or refuses to take the stand" is a comment on the evidence as to why the defendant did not testify. The words "fails" and "refuses" are "loaded" words with strong connotation which can easily be avoided by use of the words "chooses

not to tesify." This comment is a violation of Griffin v. California, supra.

Although the state's instruction was improper and even though there are much better instructions on the same subject, such as the one approved in Carter v. Kentucky, supra, trial defense counsel did not object to the use of the improper instruction, and thus they were incompetent.

Based on the above points, it is clear that trial counsel's preparation lacked any substance. It is also obvious from the record that trial counsel was less than an effective advocate, when he told the judge, out of the earshot of his client:

> Your Honor, under the circumstances, I am quite as tired of Mr. Morales as everybody else. I'm not sure I can objectively represent him at this point...I have not liked him since the very beginning

of this case. He has not followed my advice since the very beginning of this case, and I would like to withdraw.

A lawyer, especially a criminal defense lawyer, is sworn to adequately defend persons accused of public offenses without regard to personal feelings. People v. Corona, 80 Cal.App.3d 684, 145 Cal. Rptr. 894 (1978).

Based on all the incompetent tactics and strategies described above, it is clear that the petitioner's constitional right to effective assistance of counsel was denied. The conviction must be reversed.

B. THE WASHINGTON COURTS DID NOT USE THE PROPER CONSTITUTIONAL TEST OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Washington courts in this case should have used the objective standard adopted by the court in Beasley v.

United States, 491 F.2d 687, 696 (6th Cir. 1974):

> We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance of counsel. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations.

Under this objective test, it is not necessary to show the accused was actually prejudiced by defense counsel's conduct, but rather that the trial tactics and conduct would be considered incompetent by lawyers of ordinary training and skill in the criminal law. Beasley v. United States, supra. See also Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977).

If lawyers of ordinary training and skill in criminal law looked at the transcript, clerk's papers, and other

aspects of this trial, they would be forced to say under this objective standard that appellant was denied effective assistance of counsel under the 6th and 14th Amendments.

C. THE TRIAL COURT ERRED BY DENYING PUBLIC FUNDS TO PAY FOR A PSYCHIATRIC EXAMINATION.

Many criminal defendants do not have the money to hire a defense lawyer. One is provided at no expense to these people as a result of cases which need no citation. But far too many criminal defendants who have the necessary funds to hire private defense counsel do not have the funds or resources left over to hire experts, investigators, and other personnel to assist their private lawyers in the preparation of the case.

On February 23, 1979, the trial court granted the motion of trial counsel and ordered the complaining wit-

nesses to undergo a psychiatric examination. But the judge made it a condition that the defense pay for the examination. There are no findings in the order which indicate the defendant was able to pay for such services.

Again, at trial, the motion was renewed, and this time the court was asked to allow public funds for the payment of the psychiatric services. Again, there is no finding that the defendant had the funds to pay for such services. The motion was denied. (RP 4-7).

The constitutional right to effective assistance of counsel requires that the state pay for experts for an indigent defendant when those experts are necessary. The court in the instant case determined the services were necessary, but did not inquire into the financial circumstances of the defendant.

In Little v. Streater, ___ U.S. ___, 49 Law Week 4581 (U.S. Supreme Court, June 1, 1981), this Court held that a state must pay for a blood test for an alleged father in a paternity case, if he cannot pay for the test. Like the blood test in that case, the psychiatric examination in this case is very important to the defendant's ability to defend himself. The examination results would have a great influence on whether the jury believed the complaining witnesses. Like the Streater case, the petitioner in this case was denied the examination because he could not pay for it. He lost his ability to present an expert witness and to properly cross-examine the state's witnesses, under the 6th Amendment. As in Streater, the petitioner was denied due process and equal protection. The state should have been required to pay for the psychiatric exa-

minations. This is very important in a case like this, where the testimony of young children is so important. The petitioner must have the chance to defend himself against that testimony by the use of experts. Under the rationale of Little v. Streater, the state should have paid for the psychiatric examination authorized by the trial judge.

D. THE PETITIONER DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO TESTIFY.

The trial court failed to determine whether the petitioner really understood his right to testify or not to testify. Based on the judge's questioning at 285-286 and 248-249 of the transcript, it is not shown that the defendant understood what he was doing. It appears that he was just parroting what his trial counsel told him to say. This is not a knowing and voluntary waiver of

his 5th Amendment right to choose whether or not to testify at his own trial. A defendant's right to present his case under oath is obviously important in a case like this one. The conviction should be reversed on this basis.

E. THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON DEFENDANT'S NOT TESTIFYING.

Most of the argument and citations for this error are contained earlier in this petition under the section on incompetent counsel (pp. 27-30) The court should have rejected Instruction Number 7 (as set out on pp. 27-28) because it is an unconstitutional statement of the law and an unconstitutional comment on the petitioner's exercise of his 5th Amendment right. Griffin v. California, supra; Carter v. Kentucky, supra. The two instructions quoted by this Court in

Carter, 101 S.Ct. at 1116 and 101 S.Ct. at 1118, footnote 13, both avoid the prejudice and improper comment created by the words "fail" and "refuse" in Instruction Number 7.

Because this instruction defect violated the defendant's constitutional rights under the 5th Amendment, such an error requires reversal of the conviction. This error cannot be considered harmless in this case, where the jury is naturally going to wonder why the defendant did not testify and is very probably going to consider that fact when deliberating.

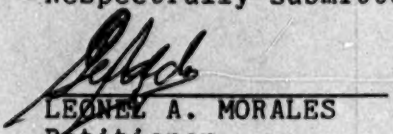
## X. CONCLUSION

The petitioner has been denied his constitutional rights under the 5th, 6th, and 14th Amendments, and this Court should reverse his conviction and order

a new trial for the petitioner.

DATED: June 12, 1981

Respectfully submitted,



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JOHN J. CHAMPAGNE
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REGINALD N. SHRIVER
DEPUTY

# The Supreme Court

State of Washington
Olympia
98504

April 17, 1981

Public Defenders Office
Mr. Paul J. Wasson, Asst.
Spokane County Courthouse
Spokane, Washington 99201

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STATE OF WASHINGTON III

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Mr. Al Gauper, Deputy
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Spokane, Washington 99201

Counsel:

Re: Supreme Court No. 47625-0- State
v. Lional Morales
Court of Appeals No. 3449-6-III

Following consideration of the above entitled Petition for Review on April 17, 1981, the following notation order was entered on page 63, Volume 2, of the Petition for Review Docket:

"DENIED"

/s/ Robert F. Brachtenbach
Chief Justice

Very truly yours,

John J. Champagne
JOHN J. CHAMPAGNE
Clerk

JJC: lb

cc: Court of Appeals, Division III

12635

FILE
IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION III
DATE DEC 18 1980
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON, Respondent, | ) | No. 3449-III-6 |
| v. | ) | Division Three Panel One |
| LIONEL A. MORALES, Appellant. | ) | Filed DEC 18 1980 |

McINTURFF, J.--Lionel Morales appeals his conviction of indecent liberties.

In August 1977, Mr. Morales was baby-sitting Shannon, age 6 years, Crystal, age 6 years, and Danielle, age 7 years, at Shannon's home. Mr. Morales allegedly entered the bedroon where the girls were

tered the bedroom where the girls were playing, removed their pants and after producing a pacifier, played with their genitalia.

At a later date, Danielle's mother, who had two children by Mr. Morales, discussed with the children her plans to live with him; however, Danielle's negative reaction prompted questioning by her mother which revealed Mr. Morales' prior activities.

Det. F. Bruce Campbell, of the Spokane Police Department, interviewed Mr. Morales on July 7, 1978, concerning the allegations of indecent liberties. Det. Campbell indicated he advised Mr. Morales of his Miranda rights two or three times because he was from another country and spoke broken English. Prior to trial, a hearing was held pursuant to CrR 3.5. At

this hearing, it was determined that Mr. Morales understood what was being said and could communicate effectively. Testimony indicated that the term oral sodomy was explained to Mr. Morales, who indicated he understood. He admitted touching Danielle in the vaginal area, and performing oral sex upon her. Testimony indicated that Mr. Morales knew the meaning of the word vagina.

On December 4, 1978, Mr. Morales moved, through his attorney, for a continuance and signed a waiver of his CrR 3.3 rights until such time as his attorney completed the investigation and preparation of his case. The trial commenced on March 28, 1979; Mr. Morales did not testify. The jury returned a verdict of guilty.

Initially, Mr. Morales contends he was denied effective assistance of counsel. In his brief, Mr. Morales' counsel on

appeal[1] reviews recent decisions concerning effectiveness of counsel and correctly states the standard to be:

> "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?"

(Italics in original.) State v. Adams, 91 Wn.2d 86, 89, 586 P.2d 1168 (1978), quoting State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Myers, 86 Wn.2d 419, 545 P.2d 538 (1976). As stated in State v. Piche, 71 Wn.2d 583, 590,430 P.2d 522 (1967):

> To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude . . . If counsel is to be stultified at trial by a post trial scrutiny of the myriad of choices he must make in the course

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[1] Trial counsel does not represent Mr. Morales on this appeal.

> of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off-- . . . he will lose the very freedom of action so essential to a skillful representation of the accused.

The choice of trial strategy and tactics to be used must rest in the attorney's judgment. Counsel on appeal has urged more than ten instances during the trial that, in his opinion, effective counsel would definitely have done differently. Some contentions would seem to have merit, but after a careful review of the record, we are convinced that Mr. Morales was afforded effective counsel and a fair trial under Adams. There may have been errors in judgment or trial tactics by the defense attorney, but as stated in State v. Aleck, 10 Wn. App. 796, 800, 520 P.2d 645 (1974):

> "Mistakes or errors of judgment do not establish the violation of a constitutional right." The constitution guarantees a defendant a fair trial, not a perfect trial.

citing State v. Silvers, 70 Wn.2d 430, 433-34, 423 P.2d 539 (1967).

Mr. Morales urges this court to adopt a newer "objective standard" to measure competence of counsel.[2] The present

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[2]Counsel for Mr. Morales urges this court to adopt the standard expressed in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974):

> We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance of counsel. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, un deflected by conflicting considerations.

Washington test, as previously indicated, is whether, after considering the entire record, it can be said the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, supra. Thomas was reaffirmed in State v. Adams, supra. While we note the suggestion of abandoning Thomas and adopting a more objective test, only our Supreme Court should change the present criteria.

Next, Mr. Morales contends his right to a speedy trial under CrR 3.3[3] was vio-

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[3]CrR 3.3 reads in part:
"(b) Time Limits.
"(1) The time limits set forth in subsections (b) (2) and (b) (3) shall commence to run from the date: (a) of the order binding the defendant over to the superior court following a preliminary hearing pursuant to JCrR 2.03 or (b) of the tenth day following the defendant's arrest in the event a preliminary hearing is not held or the charge is initially filed in the superior court. (cont. on next page)

lated. On December 1, 1978, Mr. Morales signed a waiver which stated:

> I have been advised by my attorney, Alfred E. Kitching, of my rights under Rule 3.3 of the Superior Court Criminal Rules, and I hereby waive my rights thereunder until such time as my attorneys have completed the investigation and preparation of my case, and until such time that a trial date can be set for the hearing of my case before a jury.

(Italics ours.) Trial was continued to the February trial docket. On February 28, 1979, both the State and Mr. Morales' trial attorney moved to reset the trial date. This motion was granted and trial

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3 cont.

"(2) A defendant unable to obtain pretrial release from custody shall be brought to trial within 60 days of the applicable event set forth in subsection (b) (1).

"(3) A defendant who is released from custody shall be brought to trial within 90 days of the applicable event set forth in subsection (b) (1).

was set for March 28, 1979. Mr. Morales now claims that because no additional waiver was signed for the second continuance he was foreclosed his rights under CrR 3.3.

A violation of a defendant's right to be brought to trial under the time limit specified in CrR 3.3 is not constitutional error. State v. White, 94 Wn.2d 498, 617 P.2d 998 (1980). Thus, it cannot be raised for the first time on appeal. State v. Williams, 85 Wn.2d 29, 32, 530 P.2d 225 (1971); State v. Whittier, 13 Wn. App. 293, 295, 535 P.2d 847, 348 (1975). Since the matter was not raised at the trial court, we need not consider it on appeal. However, we additionally note that a criminal defendant is bound by counsel's waiver of his rights under CrR 3.3 because these rights are procedural not fundamental.

State v. Franulovich, 18 Wn. App. 290, 292, 567 P.2d 264 (1977). Additionally, Mr. Morales expressly signed a waiver of his rights under CrR 3.3 "until such time as my attorneys have completed the investigation and preparation of my case . . ." By implication from the second continuance, his attorneys had not completed preparation and were not ready to proceed until the trial date of March 28, 1979.[4]

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[4] Even if the waiver is not construed as constituting an unlimited general waiver, but only as a limited waiver, until the February 27, 1979 trial date, no CrR 3.3 rights were violated. Mr. Morales was tried less than 30 days later on March 28, 1979. Thus, by excluding the time under the waiver, Mr. Morales was brought to trial within the 90 day speedy trial period. Since he was free on his own recognizance, his claim is without merit.

Mr. Morales next contends the trial court erred by denying public funds in payment of psychiatric examinations for the child-witness.

The right to effective assistance of counsel requires the State to pay for experts for indigent defendants when those experts are necessary. CrR 3.1(f). On the day of the trial, Mr. Morales' counsel represented to the court Mr. Morales' inability to pay for these psychiatric services and renewed his motion that the State should bear the expense. The State submitted argument that Mr. Morales' counsel represented one month earlier that his client could bear the cost and the prosecution further indicated Mr. Morales was still employed. The court stated:

> For the record, this request was made on the regular motion docket to this court on February 23 of this year, and it was represen-

> ted to this court by counsel for the defendant that he could bear the cost of the examinations by psychiatrists of the complaining witnesses, and for that reason the motion was granted and the defendant was directed to bear the cost.
>
> In view of the fact that the same request was made to Judge Shields last Friday and denied with respect to the cost being borne by the State, and in view of the fact that the matter has been continued for this number of times, it's my view that the motion is not well taken, not timely, and that the necessity of examination considering the question of whether or not this sort of testimony as regards the habit of the complaining witnesses and their life-style, the life-style of their mother or other relatives, is actually admissible, and the opportunity which will be available to the defense for cross-examination of these witnesses as to the admissible evidence of this nature, this motion will be denied; . . .

(Italics ours.) The court did not abuse its discretion.

Mr. Morales next contends the court

erred in dismissing two veniremen sua sponte without allowing cause or peremptory challenge to either.

RCW 2.36.110 states:

> It shall be the duty of a superior judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

This statute requires the trial judge to excuse a juror for, among other things, bias or inattention. The trial commenced on Wednesday, March 28, 1979. The trial judge expressed to the jury the possibility of the trial extending into the following week. One juror indicated a duty to conduct a funeral Friday afternoon. The juror was properly excused as unfit; he could possibly be inattentive during trial.

The other juror in question admitted that a similar experience to the charge against Mr. Morales occurred to someone in his immidiate family which caused his concern sitting in judgment. He was properly excused under RCW 2.36.110. Thus, this assignment of error is without merit.

Lastly, Mr. Morales contends the court erred in failing to adequately explain his right to testify on his own behalf.

Prior to the close of the defendant's case in chief, Mr. Morales was advised of his right to testify as follows:

> COURT: Mr. Morales, I advise you of the right which you have to testify in your own behalf in defense of this case. Do you understand that right?
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> INTERPRETER: He says he does not.
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> COURT: Under our law, any person charged with a crime, at

> trial, may testify or not testify as he sees fit. I ask Mr. Morales: What is your wish? Do you wish to testify or not to testify?
>
> MR. MORALES: (through the interpreter) No.
>
> COURT: Thank you.

Mr. Morales was properly advised of the right to testify in his own behalf.

Judgment of the superior court is affirmed.[5]

This opinion will be filed for public record pursuant to RCW 2.06.040 as amended by the laws of 1971, ch. 41, 1, p. 63.

McInturff, J.

WE CONCUR:

Munson, J.

Green, C.J.

[5] We commend counsel for appellant on his diligent efforts which were exemplified in his brief and oral argument.